DATE: JANUARY 25, 1996

CASE NO. 94-INA-500

In the Matter of

WASHINGTON CENTER OF AERONAUTICS
Employer

on behalf of

MINCHUL AHN
Alien

Before: Jarvis, Vittone, and Williams
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On October 5, 1992, the Employer, Washington Center of Aeronautics, filed an Application for Alien Employment on behalf of the Alien, Minchul Ahn, for the position of Foreign Student Advisor. (AF 68) The job duties were described as follows:

1) Translate Korean and English material
2) Liaison with Korean officials
3) Travel to meet students and assist them with cultural indoctrination

(AF 68)

The stated job requirements for the position, as set forth on the application, are as follows: 3 years of college education, but preferably a college degree in a technical field; plus 6 months of training in "Aircraft Flight or Mechanic." Other special requirements include: "Must be able to communicate in Korean language." The Employer listed no job experience requirement and, in fact, noted that "we will train." (AF 68)

The CO issued a Notice of Findings on March 8, 1994, proposing to deny certification on the grounds, inter alia, that the stated requirements are not the minimum job requirements for the job opportunity, because they violate the provisions of §656.21(b)(2). (AF 25-28)

The Employer submitted its rebuttal under cover letter, dated April 12, 1994. (AF 17-24) The CO found the rebuttal unpersuasive and issued a Final Determination on May 9, 1994, denying certification. (AF 12-16)

On June 13, 1994, the Employer requested a review of the denial of certification. (AF 1-11) Subsequently, this matter was forwarded to the Board of Alien Labor Certification Appeals for review.

Discussion

For the purpose of rendering a decision herein, our focus will be on the CO's determination that the requirement of 6 months training in Aircraft Flight or Mechanics is unduly restrictive. In the Notice of Findings, the CO stated that the above requirement is unduly restrictive because it is not normally required for the performance of the job of Foreign Student Advisor; it is unrelated to the job duties described in

Item 13 of the ETA 750A Form; and, it appears to be tailored to fit the Alien's qualifications. (AF 26)

Accordingly, the CO instructed the Employer to submit evidence that the requirement arises from business necessity. Specifically, the CO directed the Employer to "include documentation that would show why 6 months of training as an Aircraft Flight or Mechanic is necessary to perform this job." (AF 26)

The Employer's rebuttal consisted of a cover letter by Employer's counsel, together with various "enclosures." The enclosures consist of unsigned statements, by an unnamed source for the Employer. (AF 17-24) Regarding this issue, it was represented that the 6 months of training in Aircraft Flight or Mechanics is necessary for the following reasons: 1. lack of knowledge with the technical language of aviation has caused a problem in the past, which required material to be later corrected by a Korean pilot; 2. when someone for Employer visited the Republic of Korea, he/she was surprised that the associates there lacked understanding of aviation and training, and he/she couldn't assist them in their understanding; 3. in the Korean culture a student advisor is also an advisor to the parents; therefore, the advisors must be able to provide the necessary details to reassure the parents; and 4. in six months of training an individual can be a certified flight instructor or have approximately one-half the period required to complete instruction in "Aircraft and Powerplant." This adds credibility, which is "essential in any market." (AF 18)

In summary, Employer's counsel stated:

> From the above, it is obvious that the requirement for six months of flight training or training in Aircraft mechanics is the minimum required, and is essential in order to perform the duties of the position effectively. To accept someone for the job who had no such specific experience in the field would be a disaster. In fact, it would be much more preferable to hire someone with even more experience than the amount required (e.g., graduate of a full course of A&P instruction, or with more than just training in flight. But, being realistic, it is extremely difficult to find applicants with more than the minimum specified in this certification application.

(AF 18) Employer's counsel also noted that the requirement is not tailored to the Alien, but rather that "six months is considered a milestone or a plateau of sorts in this profession." (AF 19)

In the Final Determination, the CO rejected the Employer's rebuttal argument. Specifically, the CO noted that the Employer's rebuttal fails to establish that six months of training in Aircraft Flight or Mechanics are essential to perform the above-stated job duties.

As stated by the CO in the Final Determination:

> This requirement appears to be a preference rather than a necessity. It is not necessary for a FSA (Foreign Student Advisor) to have studied what the school specializes in, because their main duty is to assist and counsel students as they get adjusted to their academic life style. For instance, it is not necessary for a FSA of a Business School or Law School to have studied those disciplines in order to assist and advise students.
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> Also, most translators do not specialize in a particular field, they just have to know how to obtain the information/dictionaries that will assist them in translating technical material. The main duty of a FSA is to communicate the student interests with associates, and not the technical matters that are being studied by the students.
>
> The requirement for the FSA to have six months of training as an aircraft flight or mechanic remains as an unduly restrictive requirement.

(AF 13-14) We agree.

Having carefully considered the rebuttal evidence, we find that the Employer has clearly failed to document the business necessity for this restrictive requirement. First, we note that an employer must provide directly relevant and reasonably obtainable documentation sought by the CO. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc) and that unsupported assertions by an employer's counsel do not constitute evidence. See, e.g., Wilton Stationer's, Inc., 94-INA-232 (April 20, 1995); Jin Han Products Inc., 94-INA-20 (Apr. 13, 1995); Moda Linea, Inc., 90-INA-424 (Dec. 11, 1991); Personnel Services, Inc., 89-INA-43 (Dec. 12, 1990). Here, the Employer's counsel merely represented that the enclosures on rebuttal were the responses of the Employer. However, the individual(s) who authored these responses is/are unnamed (AF 17-24). Moreover, even if the rebuttal were authored by the President or other officer for the Employer, it is also well-established that mere assertions, such as those presented in the Employer's rebuttal, are insufficient to establish business necessity. Watkins-Johnson Company, 93-INA-544 (Apr. 10, 1993).

In summary, as determined by the CO, we find that the stated job duties for the position of Foreign Student Advisor (TR 68) do not require six months (or any) training in Aircraft Flight or Mechanics. It appears that this requirement was tailored to fit the Alien's qualifications. (AF 70)

Since the Employer failed to establish the business necessity for the above-stated unduly restrictive requirement, in violation of §656.21(b)(2), we conclude that labor certification was properly denied.

ORDER

The Final Determination of the Certifying Officer is affirmed and labor certification is denied.

For the Panel:

DONALD B. JARVIS
Administrative Law Judge